JUL 2 1955
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

NO. 225

COMMONWEALTH EX REL. HENRY HERNANDEZ,
Also Known as CHICO HERNANDEZ, Petitioner

v.

GRANT S. PRICE, Warden of the Allegheny County Jail, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF

SAMUEL J. GOLDSTEIN,
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I.

Where your petitioner was taken into custody by Pennsylvania authorities and held to await extradition process by the State of Illinois, which said extradition warrant was issued by the Governor of Illinois on May 20, 1955, attached to an affidavit that the petitioner did on September 13, 1952, feloniously abandon a child aged 10, sworn to on May 17, 1955, in addition to an information charging your petitioner with neglect and refusal to maintain his wife and two minor children under the age of 18 in destitute and necessitous circumstances, in addition to a complaint charging abandonment of a minor child, a felony in Illinois, sworn to on December 8, 1954, in addition to an information sworn to on October 29, 1952, charging your petitioner with neglect and refusal to maintain two minor children under the age of 18, on the basis of which the Governor of Pennsylvania issued a warrant for the arrest of your petitioner, were the proceedings adequate to charge your petitioner with a specific crime under the Law of Illinois, was the requisition from Illinois certified in accordance with the Federal Extradition Act, and was your petitioner under proper arrest where he was taken into custody in the absence of any certification? 7

II.

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Where at a hearing in the Court below on a habeas corpus petition following a demand by the State of Illinois for the return of your petitioner, counsel for your petitioner offered to produce testimony to establish that petitioner did not incur any guilt in Illinois on the dates charged, that he was not a resident of the State of Illinois on the date of the alleged commission of the crime, and that he was not a fugitive from justice from the State of Illinois, and the trial judge dismissed the warrant solely on the basis of the regularity of the documents, without making findings of fact, was your petitioner denied due process afforded him under the constitution? 10

III.

Where, after his arrest by the Detective Bureau of the City of Pittsburgh and the issuance of an extradition warrant, relator filed a petition for writ of habeas corpus alleging illegal detention, the petition being dismissed on June 27, 1955, wherein relator offered no testimony at the hearing, from which no appeal was taken, and a subsequent petition for writ of habeas corpus was filed directed to the Warden of the Allegheny County Jail alleging with particularity the reasons why his arrest and detention were illegal and at which hearing, the trial Court refused to entertain any testimony although the Commonwealth's proffer of the testimony at the June 27th hearing was refused, was the matter res adjudicata? 12

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NO. .....

COMMONWEALTH EX REL. HENRY HERNANDEZ, Also Known as CHICO HERNANDEZ, Petitioner

v.

GRANT S. PRICE, Warden of the Allegheny County Jail, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Henry Hernandez, also known as Chico Hernandez, respectfully represents:

That a writ of certiorari issue in the above captioned case to review the judgment of the Supreme Court of Pennsylvania, dated April 23, 1956; petition for reargument denied April 30, 1956.

Opinion Below

On April 23, 1956, the Supreme Court of Pennsylvania dismissed your petitioner's appeal with no concurring or dissenting opinion. (Not yet reported)

Jurisdiction

The jurisdiction of this Court is invoked under the Act of June 25, 1948, C 646, 62 Stat. 929, 28 U.S.C., Section 1257 (3), providing, *inter alia,* for jurisdiction of this Court to review by writ of certiorari the judgment rendered by the highest court of a State where any title, right, privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of, * * * the United States.

The jurisdiction of this Court is also invoked under the Act of Congress effective June 25, 1948, c 645, 62 Stat. 822; 18 U.S.C.A., Section 3181 *et seq.* known as the Federal Extradition Act.

The jurisdiction of this Court is also invoked under Article IV, Sec. 2, Clause 2, of the United States Constitution requiring the surrender of fugitives from justice between the states.

Statement of the Case.

This case comes before this Honorable Court on appeal from a judgment of the Court below (O'Brien, J.) refusing to discharge the relator on his petition for writ of habeas corpus. It appears that the appellant was taken into custody in May, 1955, by Adam Geisler, Assistant Superintendent of Police of the City of Pittsburgh, who notified the authorities in Chicago, whereupon an extradition process was instituted.

Immediately thereafter, your petitioner filed a petition for writ of habeas corpus against Adam Geisler, and hearing was held on June 27, 1955. The said peti-

tion merely alleged that your petitioner was deprived of his liberty unjustly upon an attachment issued by the State of Illinois and asked to be relieved of his imprisonment.

On June 27, 1955, the Court below dismissed your petitioner's writ and fixed bail pending appeal. No appeal was taken within the prescribed 90-day period and in the meantime, your petitioner changed counsel, who thereafter filed a petition for leave to appeal to the Supreme Court of Pennsylvania and on November 21, 1955, the Supreme Court of Pennsylvania denied the right of your petitioner to appeal *nunc pro tunc.*

Thereafter, your petitioner having been confined to the Allegheny County Jail, filed a petition for writ of habeas corpus against the Warden alleging *inter alia* that the extradition papers were illegal, that the requisition did not contain a certification, that the extradition process did not state sufficient facts with which to charge the defendant with any crime or was not sufficient to charge him with the commission of a specific crime, and that petitioner's constitutional rights have been infringed upon.

At the hearing on December 9, 1955, the Court below discharged the writ for the reasons that the extradition papers were in the prescribed form, that your petitioner was properly charged with the commission of a crime within the State of Illinois, and that the extradition documents charged the relator with being a fugitive from the State of Illinois.

The original habeas corpus proceedings were not made part of the record in the instant case and the trial

judge at the hearing on petitioner's second writ denied the Commonwealth of Pennsylvania the right to introduce the testimony of the hearing on June 27, 1955.

The Supreme Court of Pennsylvania held that the process was repetitious and being an obvious effort to secure appellate review in a proceeding from which no timely appeal was taken, should be dismissed.

The Court further held that the proceedings conformed to the requirements of the Uniform Extradition Act, that the petitioner's offer of testimony was not germane to the proceedings the question of identity having been admitted, and further held that the offer to prove your petitioner was not a fugitive from justice, was a conclusion of law.

At the said hearing on December 9, 1955, the Commonwealth offered in evidence a photostatic copy of a certification, which was verified on December 6, 1955, by the Secretary of the Commonwealth as a true copy of the original certification by the Governor of Illinois, and further that the copy of the supporting papers forwarded to Pennsylvania and the warrant issued by the Governor of Pennsylvania are complete and true copies of the originals, which are part of the aforesaid warrant issued by the Governor of Illinois.

Questions Presented for Review

1. Where your petitioner was taken into custody by Pennsylvania authorities and held to await extradition process by the State of Illinois, which said extradition warrant was issued by the Governor of Illinois on May 20, 1955, attached to an affidavit that the petitioner did on September 13, 1952, feloniously abandon a child aged 10, sworn to on May 17, 1955, in addition to an information charging your petitioner with neglect and refusal to maintain his wife and two minor children under the age of 18 in destitute and necessitous circumstances, in addition to a complaint charging abandonment of a minor child, a felony in Illinois, sworn to on December 8, 1954, in addition to an information sworn to on October 29, 1952, charging your petitioner with neglect and refusal to maintain two minor children under the age of 18, on the basis of which the Governor of Pennsylvania issued a warrant for the arrest of your petitioner, were the proceedings adequate to charge your petitioner with a specific crime under the Law of Illinois, was the requisition from Illinois certified in accordance with the Federal Extradition Act, and was your petitioner under proper arrest where he was taken into custody in the absence of any certification?

2. Where at a hearing in the Court below on a habeas corpus petition following a demand by the State of Illinois for the return of your petitioner, counsel for your petitioner offered to produce testimony to establish that petitioner did not incur any guilt in Illinois on the dates charged, that he was not a resident of the State of Illinois on the date of the alleged commission

of the crime, and that he was not a fugitive from justice from the State of Illinois, and the trial judge dismissed the warrant solely on the basis of the regularity of the documents, without making findings of fact, was your petitioner denied due process afforded him under the constitution?

3. Where, after his arrest by the Detective Bureau of the City of Pittsburgh and the issuance of an extradition warrant, relator filed a petition for writ of habeas corpus alleging illegal detention, the petition being dismissed on June 27, 1955, wherein relator offered no testimony at the hearing, from which no appeal was taken, and a subsequent petition for writ of habeas corpus was filed directed to the Warden of the Allegheny County Jail alleging with particularity the reasons why his arrest and detention were illegal and at which hearing, the trial Court refused to entertain any testimony although the Commonwealth's proffer of the testimony at the June 27th hearing was refused, was the matter *res adjudicata*?

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

Where your petitioner was taken into custody by Pennsylvania authorities and held to await extradition process by the State of Illinois, which said extradition warrant was issued by the Governor of Illinois on May 20, 1955, attached to an affidavit that the petitioner did on September 13, 1952, feloniously abandon a child aged 10, sworn to on May 17, 1955, in addition to an information charging your petitioner with neglect and refusal to maintain his wife and two minor children under the age of 18 in destitute and necessitous circumstances, in addition to a complaint charging abandonment of a minor child, a felony in Illinois, sworn to on December 8, 1954, in addition to an information sworn to on October 29, 1952, charging your petitioner with neglect and refusal to maintain two minor children under the age of 18, on the basis of which the Governor of Pennsylvania issued a warrant for the arrest of your petitioner, were the proceedings adequate to charge your petitioner with a specific crime under the Law of Illinois, was the requisition from Illinois certified in accordance with the Federal Extradition Act, and was your petitioner under proper arrest where he was taken into custody in the absence of any certification?

An examination of the extradition process indicates that the certification attached thereto by the Governor of Illinois merely certifies that the papers annexed thereto are authentic and in accordance with the laws of Illinois.

The Federal Extradition Act provides that when the executive authority of a demanding State produces to the executive authority of an asylum state copies of an indictment or affidavit, certified as authentic, such per-

son shall be arrested in the asylum state and delivered up to the proper officials of the demanding state.

In *McCline v. Meyering,* 75 Fed. (2) 716, Tennessee attempted to extradite a fugitive from Illinois and the documents contained a certification that the warrant was authentic, but no certification that the complaint or affidavit was authentic. The Supreme Court of Illinois had held that there must be proper certification by the Governor, whereas the Supreme Court of Tennessee had apparently held otherwise. The Court cited *Roberts v. Riley,* 116 U. S. 80, on the question of certification by the Governor of the demanding state, and added that the certification of a warrant is not sufficient compliance with the statute. "The Act of Congress makes no provision for the certification of a warrant in the requisition, but in the absence of an indictment the Act of Congress permits the certification of an affidavit: *Lippman v. People,* 175 Ill. 101; 51 N.E. 872."

In *Peoples v. Babb,* (1953), 114 N. E. (2d) 358, the Supreme Court of Illinois held that the Governor of the demanding state must certify to the asylum state that the indictment or affidavit is authentic, adding that Illinois will not compel the surrender of a fugitive to Massachusetts upon this failure to comply with the Federal Extradition Act. Where there is no indictment and the requisition is based on an affidavit, closer scrutiny is necessary in determining whether a crime is sufficiently charged. *Ellis v. Grimes,* 30 S. E. (2d) 921.

Pennsylvania has until the recent case of *Commonwealth ex rel. Taylor v. Superintendent of Prisons,* 382 Pa. Supreme 182, apparently adhered to the Federal Extradition Act, but in the *Taylor* case, supra, the Court

held that in a habeas corpus hearing following an extradition warrant, it was not necessary for the State to introduce into evidence the original extradition papers received from the demanding state and on file at the Governor's office, there being presumption that the issuance of a warrant by the Governor of the asylum state was prima facie evidence that the procedure was in compliance with the Statute

Counsel submits that the *Taylor* case, supra, is abortive. In *Commonwealth ex rel. Thomas v. Superintendent,* 372 Pa. Supreme 595 (1953), the Court held that extradition process was invalid where the warrant failed to allege that the accused was present in the demanding state at the time of the crime and none of the papers constituting the extradition process were authenticated by the executive authority making the demand.

This proposition has been generally sustained and means precisely that the prisoner is entitled to his discharge if the extradition process does not contain the authentication from the Governor of the demanding state; *Commonwealth ex rel. Masters v. Baldi,* 166 Pa. Super. 413; *Commonwealth ex rel. Taylor v. Superintendent of Prisons,* supra; *Ke Won Sing v. Cottone,* 123 Fed. (2d) 169.

Nothing can be presumed in extradition, and the Act of the Governor can be reviewed, so that if he has not followed the mandate of Congress, his action can be set aside as void. In *People . Enright,* 317 N.Y.S. 288, cited in *Ex Parte Hart,* 63 Fed. 249, the Governor had failed to certify the indictment, so that the Governor of the State of New York from whence the prisoner was demanded, had no authority to issue a warrant of arrest.

The doctrine of strict construction is applicable with respect to a description of the crime and a rule of strict construction is applicable as to an examination and interpretation of the extradition documents: *Ex Parte Thaw,* 214 Fed. 423 (reversed on other ground, 235 U.S. 432.)

Marbles v. Creecy, 215 U. S. 63, is authority for the proposition that a charge of specific crime, together with certification of an indictment thereon is adequate *idem*: *Hayes v. McLaughlin,* 247 N. Y. 238; cert. denied 278 U. S. 599.

II.

Where at a hearing in the Court below on a habeas corpus petition following a demand by the State of Illinois for the return of your petitioner, counsel for your petitioner offered to produce testimony to establish that petitioner did not incur any guilt in Illinois on the dates charged, that he was not a resident of the State of Illinois on the date of the alleged commission of the crime, and that he was not a fugitive from justice from the State of Illinois, and the trial judge dismissed the warrant solely on the basis of the regularity of the documents, without making findings of fact, was your petitioner denied due process afforded him under the constitution?

The opinion of the Pennsylvania Supreme Court erroneously assumed that the hearing on the petition for habeas corpus held on December 9, 1955, was a renewal of relator's petition filed June 9, 1955. The two petitions involve different parties and contained dissimilar averments. At the hearing on December 9, 1955, the Trial Court correctly refused to permit the Commonwealth to offer the testimony taken at the earlier hearing.

It cannot be concluded that the second petition was repetitious of the first, or that the proceedings thereunder were repetitious of the first. Howbeit, both proceedings were an attempt by the relator to secure his freedom. Herein lies the only similarity. The opinion of the Court relied on *Commonwealth ex rel. Young v. Day,* in 180 Pa. Super. 276, to support the theory of dismissal as repetitious and on the *Taylor* case, supra, as directly in point on the question of what is the scope of the inquiry, the opinion flatly stating that fugitivity is a conclusion of law and not inquirable. Assuming that the State has made out a prima facie case of presence in the demanding state, of the commission of the crime at the time alleged, and that the relator is a fugitive from justice, the burden to go forward then rests on the relator to overcome the presumptions thus established. Assuming that the offer of counsel to prove that relator did not incur guilt at the time alleged, and that he was not a resident of the demanding state were improper, then certainly the offer to prove that relator was not a fugitive being a question of fact, was proper: *State ex rel. Lea v. Brown,* 166 Tenn. 669; cert. denied 292 U. S. 638, *idem: S. Carol v. Bailey,* 289 U. S. 412; in re *Baker,* cert. denied 316 U. S. 699; *United States ex rel. Silver v. O'Brien,* 138 Fed. (2d) 217, cert. denied; 321 U. S. 766.

Failure to properly comply with the Act and to give the relator an opportunity to refute the essentials required in extradition would be violative of the due process clause of the Federal Constitution:

Commonwealth ex rel. Masters v. Baldi, supra;
Cert. denied 71 S. Ct. 88 (340 U. S. 866)

III.

Where, after his arrest by the Detective Bureau of the City of Pittsburgh and the issuance of an extradition warrant, relator filed a petition for writ of habeas corpus alleging illegal detention, the petition being dismissed on June 27, 1955 wherein relator offered no testimony at the hearing, from which no appeal was taken, and a subsequent petition for writ of habeas corpus was filed directed to the Warden of the Allegheny County Jail alleging with particularity the reasons why his arrest and detention were illegal and at which hearing, the trial Court refused to entertain any testimony although the Commonwealth's proffer of the testimony at the June 27th hearing was refused, was the matter res adjudicata?

There is nothing to prevent a succession of petitions for writs of habeas corpus even though they may be identically repetitious of previous issues, in which case the petitions are usually discharged perfunctorily: *Commonwealth ex rel. Gato v. Claudy*, 172 Pa. Super. 236; *Young v. Day*, supra; *Commonwealth ex rel. Lewis v. Ashe*, 142 Pa. Super. 357; *Baechus v. Burke*, 172 Pa. Super. 400.

Price v. Johnston, 334 U. S. 266, citing *Salinger v. Loisel*, 265 U. S. 224, held that "while habeas corpus proceedings are free from the res adjudicata principal a prior refusal to discharge is not without weight when the same issues are raised subsequently."

Respectfully submitted,

SAMUEL J. GOLDSTEIN,
Attorney for Petitioner.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND ARGUMENT IN SUPPORT THEREOF

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND ARGUMENT IN SUPPORT THEREOF

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

HENRY HERNANDEZ, Also Known as CHICO HERNANDEZ, Appellant, v. GRANT S. PRICE, Warden of the Allegheny County Jail	No. 81 March Term, 1956 Appeal from Order of the Court of Common Pleas of Allegheny County at No. 2611 January Term, 1956

Opinion of the Court.

JONES, J. Filed: April 23, 1956

This appeal is from an order of the Court of Common Pleas of Allegheny County denying the relator's petition for a writ of habeas corpus. As the petitioner sought release from restraint imposed pursuant to an extradition warrant, the appeal was properly taken to this Court: Section 7, Act of May 25, 1951, P. L. 415, 12 P.S. Secs. 1901, 1907. See also *Commonwealth ex rel. Henderson v. Baldi,* 372 Pa. 463, 465, 93 A. 2d 458.

On December 8, 1954, a warrant issued out of the Municipal Court of Cook County, Chicago, Illinois, for the arrest of relator on a charge of "child abandonment," admittedly a felony in Illinois. Relator was apprehended and taken into custody by the police of Pittsburgh in May, 1955.

The Cook County authorities duly sought his extradition. As a part of the application for extradition, Chabela Hernandez, relator's wife, made an affidavit on May 17, 1955, before a Judge of the Municipal Court in Chicago that relator's abandonment of his child had taken place in Chicago on or about September 13, 1952.

On May 20, 1955, the Governor of Illinois issued his requisition to the Governor of Pennsylvania requesting the return of relator who, as stated in the requisition, was charged with having committed the crime of child abandonment in Illinois and having thereafter fled the justice of that State. The Governor of Pennsylvania issued his warrant on May 24, 1955, for the arrest of relator (then in the custody of the Pittsburgh police) and for his delivery to the authorized agent of Illinois for extradition.

On June 9, 1955, relator filed his petition in the Court of Common Pleas of Allegheny County for a writ of habeas corpus on the bald and unsupported averment that he was illegally arrested and detained. At the hearing on the petition on June 27, 1955, the Commonwealth introduced in evidence, without objection from relator's counsel, all of the documents above mentioned except the requisition from the Governor of Illinois. Also, Chabella Hernandez testified at the hearing that relator was present in Illinois on the date the alleged crime was committed. At the conclusion of the hearing the petition was dismissed. No appeal from the order of dismissal was taken within the time limited therefor. On November 21, 1955, relator petitioned this Court for leave to appeal *nunc pro tunc* which we necessarily refused. Bond for relator's enlargement had been filed at

the time of the hearing in the lower Court and it was not until some time in the fall of 1955 that the warden of the Allegheny County Jail again took him into custody. Thereupon, through his new counsel, he filed the above mentioned petition for leave to appeal. Failing in that maneuver, counsel renewed relator's original petition. The Court below gave him a further hearing but in the end reaffirmed the dismissal of the petition. Relator then took this appeal.

There is nothing in the case that was either not pressed or could not have been pressed at the hearing prior to the original dismissal of the petition. The legal contentions which appellant's counsel now advances add nothing that was not inherent in the proceeding from the outset. The procedure lately pursued is a hardly disguised effort to obtain appellate review of the lower Court's final order which relator failed to appeal timely. In *Commonwealth ex rel. Young v. Day*, 180 Pa. Super. Ct. 276, 279, 119 A. 2d 559, it was said that "a petition for a writ of habeas corpus which is repetitious of a previous petition should be dismissed, for a second petition cannot be employed as a device to secure subsequent appellate review of adjudicated matters from which a timely appeal could have been taken." Here, the repetition was not even by way of a second petition. There was but the one proceeding and the one petition.

There is no merit in the appellant's contentions in any event. The facts disclose that the proceeding conformed to the requirements of the uniform Criminal Extradition Act of July 8, 1941, P. L. 288, 19 PS Secs. 191 *et seq.* See *Commonwealth ex rel. Taylor v. Superintendent, Philadelphia County Prison*, 382 Pa. 181, 184,

114 A. 2d 343, which is directly in point. As to relator's complaint that the hearing Judge erred in rejecting his offers of proof, two of them concerned matter relating to the crime charged against him and were therefore not germane to the extradition proceeding. Section 20 of the Uniform Criminal Extradition Act declares that "the guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the Governor, or in any proceeding after the demand for extradition accompanied by a charge of crime in legal form as above provided (Sec. 3) shall have been presented to the Governor, except as it may be involved in identifying the person held as the person charged with the crime." Here, relator has at all times admitted his identity. See *Commonwealth ex rel. Hatton v. Dye,* 373 Pa. 502, 506, 96 A. 2d 127; also *Commonwealth ex rel. Ghezzi v. Jeffries,* 164 Pa. Super. Ct. 48, 51; 63 A. 2d 511. The remaining offer was a conclusion of law, viz., that relator was not a fugitive from justice within the meaning of the Federal or State Constitutions and not an offer of proof of facts from which such a conclusion could be drawn. The action of the hearing judge was manifestly proper.

Appeal dismissed.